

Bradley S. Keller, WSBA #10665  
Ralph E. Cromwell, Jr., WSBA #11784  
Jofrey M. McWilliam, WSBA #28441  
Byrnes Keller Cromwell LLP  
1000 Second Avenue, 38th Floor  
Seattle, WA 98104  
(206) 622-2000  
Facsimile No.: (206) 622-2522

JOHN D. MUNDING  
MUNDING, P.S.  
9425 N Nevada St., Ste 212  
Spokane, WA 99218  
(509) 624-6464  
john@mundinglaw.com  
Attorneys for Perkins Coie LLP

The Honorable Frederick P. Corbit  
Chapter: 7

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

In Re:  
GIGA WATT, INC., a Washington  
corporation,  
Debtor.

MARK D. WALDRON, as Chapter 7 Trustee,  
Plaintiff,

vs.

PERKINS COIE, LLP, a Washington limited  
liability partnership; LOWELL NESS,  
individual and California resident; GIGA  
WATT PTE., LTD. a Singapore corporation;  
and ANDREY KUZENNY, a citizen of the  
Russian Federation;

Defendants

and  
THE GIGA WATT PROJECT, a partnership,  
Nominal defendant.

No. 18-03197-FPC11

The Honorable Frederick P.  
Corbit

**CHAPTER 7**

Adv. Case No. 20-80031

**RULE 26(f) REPORT OF  
DEFENDANTS PERKINS  
COIE AND LOWELL NESS**

1 On January 21, 2021, and again on January 22, 2021, the parties conducted a  
2 Rule 26(f) discovery conference. Counsel for the Trustee, for Perkins Coie and  
3 Lowell Ness (collectively “Perkins”), and for Andrew Kuzenny participated. In  
4 addition, counsel for putative class representative Jun Dam, who filed a class action  
5 against Perkins on behalf of token purchasers that is currently pending in the District  
6 Court, also participated.

7 Although counsel for Perkins Coie participated in good faith and attempted to  
8 objectively complete a joint report, Perkins Coie is left with no alternative but to  
9 object to the Rule 26(f) report proposed by the Trustee which is of the nature of a sur-  
10 reply brief. Perkins Coie hereby submits this separate Rule 26(f) report explaining  
11 that objection and providing the Court with Perkins’ positions on the topics addressed  
12 by the parties in their Rule 26(f) conference.

13 **A. Objection by Perkins Coie and Lowell Ness to Trustee’s 26(f) Report**

14 At the time of the parties’ conference on January 21, 2021, Perkins had not yet  
15 filed its Reply in support of its Motion to Withdraw the Reference, which addressed  
16 the right to jury trial in this matter. At that time, counsel for Perkins advised counsel  
17 for the Trustee that it disagreed with the Trustee’s analysis in its opposition, as would  
18 be explained in the Reply. The Reply was filed later that same day. *See* ECF 30.  
19 Thus, when the parties continued the Rule 26(f) conference on January 22, 2021, the  
20

1 parties' respective positions on the right to jury trial were clear. At the January 22  
2 conference, the parties again briefly addressed the right to jury trial, confirming their  
3 respective positions as set forth in the briefing. At that time, counsel for the Trustee  
4 stated that she would try to provide a draft Rule 26(f) report for everyone to review by  
5 Monday, January 25, 2021, and that it would include a statement about the right to  
6 jury trial.

7 On Wednesday, January 27, 2021, at approximately 3:00 p.m., a draft report  
8 was finally provided. Rather than a short, objective synopsis of the parties' respective  
9 positions, the draft Rule 26(f) report provided by counsel for the Trustee instead  
10 included approximately eight pages of supplemental briefing and argument regarding  
11 the Trustee's position that defendants are not entitled to a jury. The Trustees' draft  
12 report attempted (apparently) to justify this additional briefing by asserting that  
13 Perkins "demurred" to discussing the jury trial issue at the discovery conference. In  
14 fact, Perkins made clear that it disagreed with the Trustee's position on the right to  
15 trial by jury for the reasons stated in Perkins' Reply brief and the parties then agreed  
16 to disagree (ECF 30).

17 Counsel for Perkins informed counsel for the Trustee that it objected to the  
18 inclusion of supplemental briefing in a joint Rule 26(f) report but that, if the Trustee  
19 removed the briefing, Perkins would work as best it could in the short time that was  
20

1 left to finalize and submit a joint report, and that if the Trustee did not agree, Perkins  
2 would submit its own report. The Trustee would only agree to remove the  
3 supplemental briefing in the report if Perkins agreed to undertake supplemental  
4 briefing on an agreed schedule addressing topics chosen by the Trustee. When  
5 Perkins informed the Trustee that the proper way to proceed was for the Trustee to  
6 move the Court for leave to submit additional briefing, allow Perkins a chance to  
7 respond, and let the Court decide whether it wanted further briefing, counsel for the  
8 Trustee responded that the parties should submit separate reports.

9 **B. Rule 26(f) Report**

10 **1. Discovery**

11 Perkins informed the other parties that it is currently researching and  
12 considering whether to file a motion to compel arbitration. It expects to have a  
13 decision in the next two to three weeks. If it decides to demand arbitration, it will  
14 promptly file a motion seeking to compel arbitration and for a stay of all proceedings  
15 pending arbitration. If the motion is denied, it may consider an interlocutory appeal  
16 pursuant to 9 U.S.C. § 16. Accordingly, it is unclear whether and to what extent  
17 discovery may be conducted in this matter.

18 **2. Initial Disclosures**

19 Perkins believes it has complied with the initial disclosure requirements of  
20 CR 26 by virtue of having produced all escrow-related documents to the Trustee last

1 summer in connection with a Rule 2004 Order entered by this Court. Perkins does not  
2 intend to also produce documents related to the legal work it performed for  
3 Cryptonomus and Giga Watt Singapore given that none of the claims asserted herein  
4 are based on that legal work, and those documents are privileged. Counsel for the  
5 Trustee replied that she will move for an order compelling production. Perkins will  
6 oppose any such motion.

7 **3. Jury Trial**

8 The parties' respective positions on the right to trial by jury were briefed at  
9 length in the Motion to Withdraw the Reference. *See* ECF Nos. 18, 29, 30. Perkins  
10 incorporates that briefing by reference. If additional briefing is requested or granted  
11 by the Court, then it should be on a schedule that permits a full and fair response by  
12 Perkins.

13 **4. Discovery Plan**

14 Assuming arbitration is not ordered, Perkins agrees that some level of  
15 coordination on discovery is appropriate between the Trustee's action and the class  
16 action. Some discovery will pertain to both actions, but some discovery will relate  
17 only to one action or the other. There was discussion of noting all discovery in both  
18 actions and letting the parties decide on a case-by-case basis whether they wanted to  
19 participate.  
20

1           Regarding the timing of discovery, defendants accepted service of the class  
2 action on December 31, 2020, and have not yet answered. If discovery is going to be  
3 coordinated between the two actions, there needs to be a timetable that accommodates  
4 both cases. In addition, defendants are reluctant to initiate discovery prior to deciding  
5 whether to demand arbitration to avoid issues of waiver.

6           The parties discussed possible topics of discovery. Defendants believe that  
7 further time is needed to refine and particularize an actual discovery plan. In this  
8 regard, it is worth emphasizing that the Trustee has spent months and months  
9 investigating this matter. The other parties have not had nearly the time or  
10 opportunity to do so. If and when discovery may eventually move forward in this  
11 matter, Perkins believes that a minimum of 10-12 months will be necessary for fact  
12 discovery, given the scope and extent of the issues and the fact that multiple witnesses  
13 are in foreign countries and extensive, time-consuming foreign discovery will be  
14 required. Extensive expert discovery may also be required regarding cryptomining,  
15 the debtor's build-out and mining capacity, the token sale, and the duties and standard  
16 of care (or lack thereof) of the defendants, forensic accounting to determine to whom  
17 money was transferred, and damages issues, among other things. The parties  
18 discussed that it would make sense to report back to the Court in four months on the  
19 status of discovery.

1           **5. Mediation and Settlement Discussions**

2           The parties discussed the possibility of settlement. Perkins believes that it lacks  
3 sufficient information at this point to have meaningful settlement discussions.  
4 Counsel for the class action in District Court suggested that discussions about the  
5 structure of a settlement might be helpful even if it is too early to discuss other aspects  
6 of a settlement. Perkins agreed to consider the possibility.

7           DATED this 28th day of January, 2021.

8                                   BYRNES KELLER CROMWELL LLP

9                                   By /s/ Bradley S. Keller

                                      Bradley S. Keller, WSBA #10665

10                                  By /s/ Ralph E. Cromwell, Jr.

                                      Ralph E. Cromwell, Jr., WSBA #11784

11                                  By /s/ Jofrey M. McWilliam

                                      Jofrey M. McWilliam, WSBA #28441

12                                  1000 Second Avenue, 38th Floor

                                      Seattle, Washington 98104

                                      206-622-2000

                                      Fax: 206-622-2522

13                                  Email: bkeller@byrneskeller.com

  rcromwell@byrneskeller.com

14   jmcwilliam@byrneskeller.com

15                                  MUNDING, P.S.

16                                  By /s/ John Munding

                                      John Munding, WSBA #21734

17                                  9425 N. Nevada St. Suite 212

                                      Spokane, Washington 99218

                                      509-624-6464

18                                  Fax: (509) 624-6155

                                      Email: john@mundinglaw.com

19                                  Attorneys for Perkins Coie LLP and Lowell  
20                                  Ness

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 28th day of January, 2021, I electronically filed the  
3 foregoing with the Clerk of the Court using the CM/ECF System, which in turn  
4 automatically generated a Notice of Electronic Filing (NEF) to all parties in the case  
5 who are registered users of the CM/ECF system. The NEF for the foregoing  
6 specifically identifies recipients of electronic notice.

7 By /s/ Ralph E. Cromwell, Jr.

8 Ralph E. Cromwell, Jr.

9 *Attorneys for Plaintiffs*

10 1000 Second Avenue, 38th Floor

11 Seattle, Washington 98104

12 206-622-2000

13 Fax: 206-622-2522

14 Email: rcromwell@byrneskeller.com